

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S OPPOSITION TO DEFENDANTS' MOTION TO AMEND
SCHEDULE FOR HEARING ON PLAINTIFFS' [SIC] MOTION FOR PRELIMINARY
INJUNCTION [DKT #1482]**

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Factual Background.....	3
III.	Legal Standard.....	6
IV.	Argument.....	7
A.	The State has complied with the expert disclosure deadlines with only minor exceptions and those minor exceptions have created no prejudice to Defendants.	7
1.	Dr. Bernard Engel.....	7
2.	Dr. Bert Fisher.....	8
3.	Dr. Valarie Harwood.....	10
4.	Dr. Christopher Teaf.....	13
5.	Dr. Robert Lawrence.....	15
6.	Dr. Robert Taylor.....	15
7.	Dr. Roger Olsen.....	16
B.	Defendants' Arguments regarding Rule 26(a)(2)(B) are without merit.....	17
V.	Conclusion.....	18

TABLE OF AUTHORITIES

Cases

Midwest Guaranty Bank v. Guaranty Bank, 270 F.Supp. 2d 900, 917-18
(E.D. Mich. 2003).....6, 18

See Seattle Audubon Society v. Sutherland, 2007 WL 1655152, *1
(W.D. Wash. June 5, 2007).....6

Rules

Federal Rule of Civil Procedure 26(a)(2).....6

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State") submits the following opposition to Defendants' Motion to Amend Schedule for Hearing on Plaintiffs' [sic] Motion for Preliminary Injunction [DKT #1482] ("Defendants' Motion"). Defendants' Motion is factually unfounded, prejudicial to the public health, and should be denied.

I. Introduction

The State's Motion for Preliminary Injunction, which the Court has set for hearing on February 19, 2008, seeks to enjoin the land application of fecal bacteria-laden poultry waste in the IRW. Late winter and spring are the months of heaviest land application of poultry waste in the IRW. With the spring rains, the fecal bacteria from this poultry waste will run-off into the waters of the IRW. As spring and summer arrive, people will make their way to the streams and rivers of the IRW to canoe, raft, wade and swim in its waters. Meanwhile, many rural residents will use the water from wells and springs for drinking. The combination of Defendants' voluminous spring land application of fecal bacteria-laden poultry waste, the spring and summer recreation activities of the public, and residents' reliance upon well and spring water for drinking poses a serious public health hazard. Any delay of the preliminary injunction hearing is effectively a temporary denial of the motion and enables Defendants to continue practices that create a serious threat to the public.

The complaints set forth in Defendants' Motion are wholly unwarranted. Not only has the State complied with the disclosure requirements for its experts, the State has gone above and beyond those requirements by continuing to disclose to Defendants materials that its experts

have considered *after* the submission of their affidavits on November 14, 2007, that are part of their on-going case preparations for the preliminary injunction hearing and their April 1, 2008 Rule 26 expert reports. Notably, none of these materials have resulted in any substantive change to the opinions set forth in those November 14, 2007 affidavits or in the opinions given in their depositions. Defendants' complaints are entirely make-weight, have not resulted in them suffering any prejudice, and are nothing but an improper effort to create delay.

Indeed, the fact that the Motion for a Preliminary Injunction is to be heard on a developing record is neither surprising nor prejudicial to Defendants. The fact that the State sought this preliminary relief before it had completed its entire trial preparation certainly does not support any amendments to the existing schedule or exclusion of any materials from the preliminary injunction hearing. As an examination of the facts will reveal, the State has fully and in good faith complied with the Court's order regarding production of the materials considered by their experts in forming the opinions set out in the affidavits filed on November 14, 2007. It is true that the State's experts continue to receive and review a variety of materials that are relevant to the issue currently before the Court as well as the case as a whole. That is entirely permissible as a matter of law in a preliminary injunction proceeding such as this. As noted above, as of this date, none of those materials have changed the opinions of these experts. As the State's experts have continued to consider additional matters related to those opinions, the State has not hidden that fact, but rather has sought to apprise Defendants of those matters. Supplementing the experts' materials in this manner was not required by the Court's Order, but the State has made its continuing disclosures in the spirit of that Order. There is no prejudice to Defendants by the State's actions and no reason for delaying the preliminary injunction hearing.

Nor is there any reason for limiting the State's experts in the scope of their testimony at that hearing.

II. Factual Background

The State filed its Motion for Preliminary Injunction on November 14, 2007. This filing was accompanied by affidavits setting forth the opinions of the State's nine expert witnesses on the issue raised therein.¹ On December 4, 2007, for each of the nine expert witnesses upon whose opinions the State relies, the State produced copies of curriculum vitae, billing rates, lists of publications from the last ten years, and lists of testimony in litigation from the last four years.² At a hearing on December 21, 2007, the Court required that materials considered by the experts were to be provided to Defendants 21 days before the experts' respective depositions. *See* DKT #1425. Prior to that ruling, the State already sent Defendants the "considered" materials of Drs. Lawrence, Taylor, Engel and Caneday.³ The State met the 21-day deadline for the remainder of the experts' "considered" materials, with only a small number of exceptions that have created no prejudice to Defendants.

By the hearing date of February 19, 2008, Defendants will have had the State's Preliminary Injunction Motion and the affidavits setting forth the opinions of the State's experts for *over three months*. Further, they will have had the opportunity to depose each of the State's experts at length and will have had more than adequate time to review the expert materials produced to them.

¹ A supplemental affidavit from Dr. Harwood was filed on December 20, 2007. *See* DKT #1416.

² Dr. Harwood's list of publications was supplemented on December 10, 2007.

³ Dr. Caneday's materials were later supplemented with five documents, which met the 21 day deadline.

Defendants' continued characterization of the Motion for Preliminary Injunction as a "surprise" is absurd. The State disclosed its intent to file the motion *repeatedly* to Defendants, starting over a year ago, and the prospect of a preliminary injunction was discussed at hearings for months before it was filed. *See, e.g.*, Plaintiff's Motion for Entry of Scheduling Order [DKT #1026], p. 2 ("Plaintiff has notified Defendants that Plaintiff contemplates filing a Motion for Preliminary Injunction."); Defendants' Scheduling Proposal Pursuant to January 5, 2007 Order [DKT#1027], p. 3 (acknowledging that the State notified Defendants of its intent to file a motion for preliminary injunction on January 12, 2007); *see also* February 15, 2007 Hearing Transcript, p. 175; September 27, 2007 Hearing Transcript, p. 15; November 6, 2007 Hearing Transcript, p. 194 (discussing the State's intent to file a preliminary injunction). This mischaracterization of a "surprise" element to the preliminary injunction is completely baseless, a red-herring, and should not be considered by the Court in its analysis of the pending motion.⁴

Notably, because of the rapidly approaching April 1, 2008 Rule 26 expert disclosure deadline in this case, the State's nine experts who provided affidavits in connection with the Motion for Preliminary Injunction have continued to work on their overall opinions in the case as a whole. Some of that ongoing work overlaps with issues addressed by the Motion for Preliminary Injunction. Whenever there has been a situation where material that may pertain to the preliminary injunction has been provided to an expert after his or her affidavit was filed, the State has timely notified Defendants of these updates. (Undoubtedly, if the State had *not* provided these supplemental updates of the expert witnesses' ongoing work that could pertain to the preliminary injunction, Defendants would have complained of a *lack* of disclosure on the part

⁴ Additionally, it should not be overlooked that a claim for bacterial injury has been a part of the State's case since the case was first filed in June 2005, *see* Complaint [DKT #2], or that Defendants have been receiving rolling production of the State's scientific data pertaining, in part, to this injury since February 2007.

of the State.) The majority of the materials contained in these supplemental disclosures were obtained by the State's experts for their ongoing work in the case as a whole *after* the 21-day deadlines, and disclosed to Defendants because the topics may overlap some of the topics the experts will address for the preliminary injunction. Again, to repeat, to date, none of the experts' opinions set forth in the affidavits or the depositions have substantively changed based on additional materials obtained by these experts. As explained to Defendants in a meet and confer conversation on January 17, 2007, and in the State's Motion for a Status Conference [DKT #1465, p. 4], if the experts' opinions were to substantively change for any reason, the State would advise Defendants and disclose any materials relevant to those new opinions.

Defendants have nonetheless taken the position that the State's expert preparation should be frozen in time as of November 14, 2007, when the State filed its Motion for Preliminary Injunction. Under Defendants' position, a preliminary injunction motion would stall the progress of a case as opposed to advancing the progress of a case. Defendants' position is unrealistic and improper, particularly in light of Defendants' discovery intransigence (which has resulted in the State just now getting partial information that, in some instances, was requested almost two years ago) and the State's fast-approaching Rule 26 expert report deadline of April 1, 2008. To the extent that the State's experts come across information that causes them to modify, add or bolster the opinions that were disclosed in connection with the State's Motion for Preliminary Injunction, the State's experts should be allowed to do so. Should they do so, the State will disclose any new opinions and the accompanying reliance materials as soon as possible.

As explained in detail below, the majority of the supplemental materials were not provided within the 21-day deadlines simply because the experts did not have these materials until *after* those deadlines passed. The supplemental materials constitute only a tiny proportion

of the large number of materials that were disclosed in a timely manner, and the supplemental materials do not change any of the opinions set forth by the experts in their affidavits. The supplements to the experts' considered materials were provided in the spirit of full disclosure so that Defendants would be apprised of the experts' ongoing work in these areas. These disclosures certainly have not caused Defendants any prejudice and do not warrant amendment of the preliminary injunction schedule. Each of the complaints set forth by Defendants regarding the State's experts is addressed individually below.

III. Legal Standard

A preliminary injunction proceeding is by its very nature "preliminary" and necessarily involves a *developing* evidentiary record. *See, e.g., Midwest Guaranty Bank v. Guaranty Bank*, 270 F.Supp. 2d 900, 917-18 (E.D. Mich. 2003) ("Before the Court is Midwest Guaranty's motion for preliminary injunction. Such a motion is heard on an expedited basis, with a record that is continuously developing. The need to continuously supplement the record is obvious . . .").

Federal Rule of Civil Procedure 26(a)(2) governs the disclosure of expert materials in preparation for *trial*. However, the hearing on the motion for preliminary injunction is not a full-fledged trial. Thus, the expert affidavits filed with the State's Motion for Preliminary Injunction were not intended to be or required to be all-inclusive Rule 26 expert reports.⁵ *See Seattle Audubon Society v. Sutherland*, 2007 WL 1655152, *1 (W.D. Wash. June 5, 2007) ("Rule 26(a)(2)(C) is inapplicable here, where the parties are not preparing for trial, but for a preliminary injunction hearing").

⁵ Magistrate Joyner's December 26, 2007 Order [DKT # 1425] addressed solely what expert materials needed to be disclosed and the timing of those disclosures. It (quite correctly) did not require disclosure of Rule 26 expert reports in connection with the preliminary injunction.

IV. Argument

A. **The State has complied with the expert disclosure deadlines with only minor exceptions and those minor exceptions have created no prejudice to Defendants.**

The issues raised by Defendants about the State's expert disclosures are addressed individually below.

1. **Dr. Bernard Engel**

Defendants' two complaints regarding Dr. Engel's considered materials mischaracterize the facts about materials produced. Defendants' first complaint pertains to a list of six websites provided to Defendants during Dr. Engel's deposition. *See* Ex. 1, List of website addresses. This list was provided as a courtesy and convenience to Defendants because Dr. Engel's timely-produced considered materials contain excerpts from these websites that he considered in forming his opinions. *See* Ex. 2, PI Engel 1604 - 1609. This list was intended to be a convenient manner in which to provide these website addresses, not a new or different disclosure than the previous disclosures. For example, one of the documents produced as part of Dr. Engel's considered materials is PI Engel 1604, which is a table with data for various counties in the IRW that Dr. Engel created using information from National Land Cover Data 2001 ("NLCD 2001"). *See id.* at PI Engle 1604. At Dr. Engel's deposition, the website address where this information was gathered from the NLCD 2001 was provided to Defendants as a courtesy. *See* Ex. 1, List of website addresses. In any event, the material that Dr. Engel considered from these websites was timely produced in the original production, and the information at these website addresses does not change Dr. Engel's opinions and thus has not created any prejudice for Defendants.

As to Defendants' second complaint -- that materials considered by Dr. Engel were disclosed after his deposition -- on January 22, 2008, the State provided Defendants with a list of

five depositions that had been sent to Dr. Engel on January 17, 2008. On January 25, 2008, the State advised Defendants that Dr. Engel had been provided with a copy of three articles from Dr. Fisher's files. The three articles from Dr. Fisher's files were not provided to Dr. Engel until January 22, 2008. Thus, Dr. Engel had had these materials for only a matter of days before disclosure was made to Defendants. The five deposition transcripts and three articles were provided to Dr. Engel for his ongoing work in the case. They have not substantively changed any of the opinions set forth in his affidavit or at his deposition on January 15, 2008. However, these materials could pertain to his opinions for the preliminary injunction, and thus in an effort to make full disclosure of any and all materials in the experts' possession regarding the preliminary injunction, the State advised Defendants that these materials were provided to Dr. Engel.

Defendants had a full and fair opportunity to examine Dr. Engel, and the materials he considered. They have suffered no prejudice which would warrant exclusion of materials from the preliminary injunction hearing, or amendments to the schedule.

2. Dr. J. Berton Fisher

Defendants' Motion makes two complaints about disclosure of Dr. Fisher's materials, neither of which have merit. First, Defendants complain that three days before Dr. Fisher's deposition they received a supplement of Dr. Fisher's materials, containing "two water quality/hydrology studies." On January 18, 2008 Dr. Fisher considered for the first time two studies, a vulnerability assessment for the waters of Oklahoma, and a report entitled "Basin-Wide Pollution Inventory for the Illinois River Comprehensive Basin Management Program" which were disclosed to Defendants that same day. They are in fact part of his ongoing work on the case, and have not substantively changed the opinions set forth in his affidavit.

Defendants' second complaint about Dr. Fisher is that at his deposition, he said he had seen some materials that were not produced in his considered materials. This complaint ignores the context of Dr. Fisher's comments, and the fact he did not consider them for his opinions for the preliminary injunction. It was explained to counsel for Defendants at the deposition by both Dr. Fisher and counsel for the State that Dr. Fisher has *not* performed work regarding computations of waste from sources other than poultry litter, and that that work pertaining to such calculations was undertaken by other experts. Despite the fact Dr. Fisher explained that he had *not* done such calculations, and that those calculations were the work of other experts in the case, counsel for Defendants insisted on questioning Dr. Fisher about this issue, claiming to be "simply exploring [Dr. Fisher's] knowledge of that work" performed by other experts, *see* Ex. 3, Fisher Deposition, p. 32:117-18. Now Defendants are erroneously attempting to argue these materials should have been produced with Dr. Fisher's considered materials, even though he did not consider them.

To the extent Dr. Fisher has seen information from other experts, on issues that he is *not* addressing for the preliminary injunction, then it follows that those materials were not part of his "considered" materials because he did not consider them for his opinions contained in his affidavit included in the State's Motion for Preliminary Injunction. In short, the materials referenced in Dr. Fisher's deposition that Defendants are complaining about are not materials that Dr. Fisher considered for the opinions he is going to present at the preliminary injunction hearing. These are materials he may have seen in his general work on the case in chief, but ones that a different expert will address for the preliminary injunction. The pertinent materials concerning waste calculations relevant to the preliminary injunction were timely provided to Defendants with the disclosure of Dr. Teaf's materials. When asked by counsel for the Tyson

Defendants for those materials after Dr. Fisher's deposition, counsel for the State promptly advised Defendants of the bates ranges in Dr. Teaf's previously produced materials.

The State does bring to the Court's attention an issue which was not raised in Defendants' Motion, but which it is anticipated they will raise once the lack of merit of their other complaints is revealed to the Court. In producing the documents considered by Dr. Fisher, there was one oversight. Dr. Fisher had correlated data received from cores taken from the bottom of Lake Tenkiller with census information concerning the growth in the number of people, cattle and swine in the watershed. Through oversight, Dr. Fisher did not include those graphs in his production. However, one version of this graph was actually included in the production of another witness and used by Defendants in the examination of Dr. Fisher. Additionally, Dr. Fisher did include the actual data reflected in these graphs in a spreadsheet format with the materials in his timely disclosure so that the graphs themselves could be easily created. Thus, Defendants have not suffered any prejudice from this oversight. Dr. Fisher's production has been supplemented to include these charts. Nor have they demonstrated that they have suffered any prejudice from the other complaints regarding Dr. Fisher set forth in their motion. Thus, exclusion of materials or amendment of the schedule is unwarranted.

3. Dr. Valarie Harwood

Defendants' complaints about Dr. Harwood's considered materials mischaracterize numerous aspects of the production. First, Defendants complain that the State failed to meet the disclosure deadline for Dr. Harwood's materials, claiming incomplete disclosures were made, and then that supplemental disclosures were provided to Defendants. The Court set a deadline of January 8, 2008 for Dr. Harwood's considered materials to be produced. A large number of her considered materials were produced to Defendants well in advance of that deadline on December

20, 2007, and a supplement was provided by the deadline of January 8, 2008. On January 11, 2008, after being in possession of many of these materials for weeks, counsel for the Tyson Defendants asked a number of questions about the production,⁶ which were promptly responded to by counsel for the State. *See* Ex. 4, January 10, 2008 email from Xidis to Jorgensen. To simplify Defendants' review of documents, per Defendants' request a handful of spreadsheets were produced a second time in an alternative format on January 11, 2008. *See* Defendants' Motion, Ex. 7. One seven-page document was accidentally omitted from the timely productions, and that document was provided to Defendants on January 11, 2008. From a production of over 3000 pages of "pdf" documents, and 1400 electronic files, complaints about a mere seven pages that were accidentally not transmitted in a production (an omission that was quickly rectified with their production a short three days later) is make-weight and should not be credited. The production of a mere seven pages three days late, and a repeated production of materials as a convenience to Defendants, certainly has not created any substantial prejudice for Defendants, especially in light of the fact it appears they did not begin to review Dr. Harwood's materials until weeks after the initial production. *See supra*, footnote 6.

Defendants' Motion incorrectly alleges that the State was withholding data derived from DNA analysis that was not provided to Defendants until the production of Dr. Harwood's materials. The data Defendants complain about is DNA analysis that was part of the expert work product of the State. As part of the State's investigation into the pollution of this watershed, its

⁶ These questions included inquiries that make it evident that Defendants have not been as desperate to use every moment to prepare to examine these witnesses as they have represented, including "is it possible you have sent a complete list of publications, testifying experiences, and her retention contract (including the rate) in this case? If so, I have not seen these materials. Would you confirm you have provided them or send me copies?" *See* Ex. 5, January 9, 2008 email from Jorgensen to Xidis. Dr. Harwood's list of testimony, publications, and billing rates had been in Defendants' possession for over a month at the time this inquiry was made by counsel for the Tyson Defendants.

experts investigated whether a DNA signature could be isolated that would help track bacteria from poultry as it moved through the watershed. The State was open about the fact that this work was ongoing and promised that once this effort was completed, the data from any environmental testing for such a marker would be produced. In fact, this production was done in a timely manner with the disclosure of Dr. Harwood's materials.

Although Defendants do not raise these issues in their pending motion, at the hearing on January 30, 2008, Defendants made several mischaracterizations about Dr. Harwood's disclosures. Defendants complained that Dr. Harwood testified at her deposition that she provided e-mail correspondence from her materials to counsel for the State, and that the State did not disclose that correspondence. Because this discovery is being undertaken in preparation for a preliminary injunction hearing, and not for a trial, the State has not provided all correspondence for the nine experts. If there were circumstances in which the experts' correspondence contained substantive information considered by the experts in forming their preliminary injunction opinions, and that substantive information was *not* otherwise included in their collections of "considered" materials, that correspondence was produced. Correspondence that pertained to their work in other areas of the case as a whole, or that contained no substantive information (*e.g.* setting up a time for a telephone call), was not produced. In Dr. Harwood's case, when she was asked by the State to gather materials she considered in forming her opinions for the preliminary injunction, she provided various materials, including selected email correspondence, all of which was in turn produced to the Defendants.⁷

⁷ Although the State was provided with an earlier set of email correspondence from Dr. Harwood in August 2007, she did not specify that those materials were considered for her opinions for the preliminary injunction. The State is reviewing these materials with Dr. Harwood to ensure that no considered email correspondence was inadvertently omitted from her disclosure.

At the January 31, 2008 hearing, Defendants also complained that Dr. Harwood had formed her opinions in this case over one year ago. This representation is simply a misleading attempt to erroneously portray the State as concealing information. That is absolutely false. Dr. Harwood has been working on her opinions continuously for years. There is no doubt that Dr. Harwood came to some opinions regarding Defendants' pollution of this watershed early in that research. Ultimately though, the full scope of the opinions set forth in her affidavit were not finalized until the filing of her supplemental affidavit on December 20, 2007. It was only then that sufficient testing for the identified bacterial bio-marker was sufficient for her to voice her preliminary opinion on that topic. In fact, even after the supplemental affidavit was filed, Dr. Harwood conducted further analysis of the DNA data and more such data was received, and in turn produced to the Defendants as a supplemental disclosure for Dr. Harwood. There is no doubt that Dr. Harwood had arrived at some opinions relative to Defendants' pollution of this watershed prior to the filing of her affidavits, but again, Defendants mischaracterize the evidence when they suggest that the State had some duty to reveal the opinions of Dr. Harwood prior to filing the Motion for Preliminary Injunction.

The deposition of Dr. Harwood went forward as scheduled on January 29, 2008 and Defendants were able to conduct a full day of questioning on all topics of her testimony for the preliminary injunction hearing. Thus, they have had a full and fair opportunity to examine Dr. Harwood and have suffered no prejudice that would warrant extension of the deadlines or exclusions of materials

4. Dr. Christopher Teaf

Defendants' complaints that the State provided two supplements to Dr. Teaf's materials prior to his deposition are without merit. As to the first supplement of materials, as part of their

continuing preparation of this case, counsel for the State provided Dr. Teaf with a letter from the EPA to the ODEQ and a corresponding EPA decision document. The State promptly disclosed this letter and decision document to Defendants on January 21, 2008. These documents related an error in a report from the ODEQ to the EPA regarding bacterial contamination of the IRW, and the EPA's acceptance of a correction of that error. As to the second supplement addressed in Defendants' Motion, the week of January 21, 2008, Dr. Teaf received three scientific articles from Dr. Fisher's materials, and his receipt of those materials was disclosed to Defendants on January 22 and 25, 2008.

None of these supplemental materials changed the opinions set forth by Dr. Teaf in his affidavit. Dr. Teaf considered them as part of his ongoing work in this case, and that fact was disclosed to Defendants because they may pertain to his opinions for the preliminary injunction hearing. His deposition was conducted on January 31, 2008, and Defendants were afforded a full opportunity to question him concerning all matters considered by him in preparing his affidavit and all matters considered after that time that might have affected these earlier opinions. These subsequently provided materials did not cause him to change his opinions concerning the imminent and substantial risk to human health. Nor did these subsequently provided materials cause him to change his views concerning the source of the bacteria creating that risk. Thus, Defendants certainly cannot claim any prejudice was caused by him having been provided these materials.

As with Dr. Harwood, at Dr. Teaf's deposition, Defendants complained that not all of Dr. Teaf's e-mails were provided. As with other experts, Dr. Teaf is considering matters which have nothing to do with the bacterial hazard existing in the IRW. The State did not produce these unrelated materials or the e-mails concerning those topics. The State has also not produced all of

Teaf's correspondence, including routine e-mails with no substantive information. Any complaints by Defendants in this regard are specious.

5. Dr. Robert Lawrence

Defendants complain that the State disclosed "three EPA publications" the Friday before Dr. Lawrence's deposition. The fact of the matter is that on Friday, January 25, 2008, Dr. Lawrence was provided with four website links and one article for his review in his ongoing work in this case, all of which are publically available government documents from the EPA and the Oklahoma Water Resources Board. That same day, those materials were disclosed to Defendants as materials provided to Dr. Lawrence. As Defendants discovered at Dr. Lawrence's deposition on January 28, 2008, the materials provided on January 25, 2008 did not change the opinions from those set forth in Dr. Lawrence's affidavit. Because Dr. Lawrence's opinions have remained unchanged, Defendants have suffered no prejudice which warrants exclusion of materials or an amendment to the schedule.

6. Dr. Robert Taylor

Defendants complain that the State disclosed two articles as a supplement to Dr. Taylor's materials after Dr. Taylor was deposed. Dr. Taylor was deposed on January 8, 2008, and his considered materials were produced within the 21 day deadline. He was provided with two articles from Dr. Fisher's materials the week of January 21, 2008, and counsel for the State advised Defendants of this fact on January 25, 2008. These materials were provided to Dr. Taylor for his ongoing work in this case, and were disclosed to Defendants because they may pertain to his opinions for the preliminary injunction hearing. The opinions set forth by Dr. Taylor in his affidavit and deposition have not changed as a result of him being provided with these two articles and thus these two articles have not created any prejudice for Defendants.

7. Dr. Roger Olsen

Defendants complain at length about two databases Dr. Olsen considered that were provided to Defendants on January 22, 2008 and allege that this supplement has “derailed” the discovery process.⁸ As the facts demonstrate, no such derailment has occurred, and the Defendants have not suffered any prejudice. These two databases that the Defendants complain about contain recent updates to data runs made after Dr. Olsen’s considered materials were produced. These data runs were performed in order to continue the statistical analysis and consider additional sampling data. Produced with these was also general research performed by Dr. Olsen in the weeks after his considered materials were produced concerning the chemical signatures of waste water from public waste treatment systems. This is part of Dr. Olsen’s continued effort to identify the extent of pollution from poultry and to separate out that pollution from pollution coming from other possible sources. This is work that is on going and will probably continue right up until the time that the Rule 26 disclosures are made. Upon receiving these materials, Defendants requested that Dr. Olsen’s deposition be rescheduled. In response to this request, the State offered to provide Dr. Olsen for deposition at a later date, and the parties agreed upon Saturday, February 2, 2008. The concern set forth in Defendants’ Motion that as a result of this rescheduling, the deposition schedules of Drs. Harwood and Teaf “may well be destroyed” has proven to be unrealistic and unsubstantiated, as the depositions of Drs. Harwood and Teaf went forward as scheduled on January 29 and 31, 2008, and Dr. Olsen’s deposition went forward on February 2, 2008. The State provided Defendants with extra time to prepare for

⁸ At Dr. Olsen’s deposition on February 2, 2008, Defendants complained that the supplement did not contain charts and graphs that earlier runs of the database had contained. Dr. Olsen testified that he did not consider those in coming to his opinions and that given the format of the data, Defendants had everything they needed to create those graphs and charts. In spite of this, the State is willing to have Dr. Olsen create these graphical representations and the State will provide them to the Defendants.

Dr. Olsen's deposition and they were able to thoroughly examine Dr. Olsen about his opinions. Therefore, they have suffered no prejudice which would warrant excluding materials or amending the schedule.

B. Defendants' arguments regarding Rule 26(a)(2)(B) are without merit.

Defendants' Motion for Delay complains that Drs. Engel and Fisher continue to perform work. As explained repeatedly above, to date, the experts' opinions have not changed, and if they were to change, the State would advise Defendants. Furthermore, their opinions are not frozen in time. These two experts as well as the others are continuing their work on this case. As explained above, the State's nine experts involved in the preliminary injunction are also working on their Rule 26 reports for the case as a whole, which are due April 1, 2008. Their work and their minds cannot be frozen in time at the moment they signed their affidavits. They continue to perform work and this is to be expected in the context of a preliminary injunction, and thus these experts and counsel for the State have reserved their rights on the record in the depositions.

There is no merit to Defendants' argument that the State's position that their experts are free to continue to work on the case and to consider additional information, is "unsupported in the law and contrary to the Court's direction." Defendants provide *no authority* for the position that such a freeze would be appropriate in the context of a preliminary injunction. Defendants' argument simply cites to a portion of Rule 26, and argues that this preliminary injunction be treated like a trial. Plaintiffs *have* provided complete disclosures of the experts' opinions pursuant to the Court's order. However, the reality of this case is that it is not at the expert disclosure stage for *trial*, but for a preliminary injunction. The entire nature of a preliminary injunction is that it happens *before* a trial, while the parties continue to prepare their case and

while the record continues to develop. *See Midwest Guaranty Bank v. Guaranty Bank*, 270 F.Supp.2d 900, 917-18 (E.D. Mich. 2003) ("Before the Court is Midwest Guaranty's motion for preliminary injunction. Such a motion is heard on an expedited basis, with a record that is continuously developing. The need to continuously supplement the record is obvious . . ."). Thus, in the context of this Motion for Preliminary Injunction, the State has provided complete opinions, and if any opinions were to change prior to the preliminary injunction, the State would advise Defendants.

V. Conclusion

For the reasons stated herein, Defendants' Motion to Amend Schedule for Hearing on Plaintiffs' [sic] Motion for Preliminary Injunction should be denied in its entirety, as Defendants have not suffered in any prejudice in regard to the State's experts.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
 ATTORNEY GENERAL
 Kelly H. Burch OBA #17067
 J. Trevor Hammons OBA #20234
 Tina Lynn Izadi OBA #17978
 Daniel P. Lennington OBA #21577
 ASSISTANT ATTORNEYS GENERAL
 State of Oklahoma
 313 N.E. 21st St.
 Oklahoma City, OK 73105
 (405) 521-3921

/s/ Richard T. Garren

M. David Riggs OBA #7583
 Joseph P. Lennart OBA #5371
 Richard T. Garren OBA #3253
 Douglas A. Wilson OBA #13128
 Sharon K. Weaver OBA #19010
 Robert A. Nance OBA #6581
 D. Sharon Gentry OBA #15641

RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis Werner Bullock OBA #1305
James Randall Miller OBA #6214
MILLER, KEFFER & BULLOCK
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

David P. Page OBA #6852
BELL LEGAL GROUP
P. O. Box 1769
Tulsa, Ok 74101-1769
(918) 398-6800

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick
(admitted *pro hac vice*)

MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2008, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Tina Lynn Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General	daniel.lennington@oag.ok.gov

M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Douglas A. Wilson	doug_wilson@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	

Louis Werner Bullock	lbullock@bullock-blakemore.com
James Randall Miller	rmiller@mkblaw.net
MILLER, KEFFER & BULLOCK	

David P. Page	dpage@edbelllaw.com
BELL LEGAL GROUP	

Frederick C. Baker	fbaker@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC	

Counsel for State of Oklahoma

Robert P. Redemann	rredemann@pmrlaw.net
Lawrence W. Zeringue	lzingue@pmrlaw.net
David C. Senger	dsenger@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	

Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	

Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.

John H. Tucker	jtucker@rhodesokla.com
Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Leslie Jane Southerland	ljsoutherland@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	

Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	

Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Dara D. Mann	dmann@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
FAEGRE & BENSON, LLP	

Counsel for Cargill, Inc. & Cargill Turkey Production, LLC

James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Paul E. Thompson, Jr	pthompson@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
BASSETT LAW FIRM	

George W. Owens	gwo@owenslawfirm.com
Randall E. Rose	rer@owenslawfirm.com
OWENS LAW FIRM, P.C.	

Counsel for George's Inc. & George's Farms, Inc.

A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com

Philip Hixon
Craig A. Merkes
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

phixon@mhla-law.com
cmerkes@mhla-law.com

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
Counsel for Peterson Farms, Inc.

sbartley@mwsgw.com

John Elrod
Vicki Bronson
P. Joshua Wisley
Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, LLP
Counsel for Simmons Foods, Inc.

jelrod@cwlaw.com
vbronson@cwlaw.com
jwisley@cwlaw.com
bfreeman@cwlaw.com
rfunk@cwlaw.com

Stephen L. Jantzen
Paula M. Buchwald
Patrick M. Ryan
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

sjantzen@ryanwhaley.com
pbuchwald@ryanwhaley.com
pryan@ryanwhaley.com

Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Thomas C. Green
SIDLEY, AUSTIN, BROWN & WOOD LLP

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com
tcgreen@sidley.com

Robert W. George
Michael R. Bond
Erin W. Thompson
KUTAK ROCK, LLP
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.

robert.george@kutakrock.com
michael.bond@kutakrock.com
erin.thompson@kutakrock.com

R. Thomas Lay
KERR, IRVINE, RHODES & ABLES

rtl@kiralaw.com

Jennifer Stockton Griffin
David Gregory Brown
LATHROP & GAGE LC
Counsel for Willow Brook Foods, Inc.

jgriffin@lathropgage.com

Robin S Conrad

rconrad@uschamber.com

NATIONAL CHAMBER LITIGATION CENTER

Gary S Chilton gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
Counsel for US Chamber of Commerce and American Tort Reform Association

D. Kenyon Williams, Jr. kwilliams@hallestill.com
Michael D. Graves mgraves@hallestill.com
Hall, Estill, Hardwick, Gable, Golden & Nelson
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.

Richard Ford richard.ford@crowedunlevy.com
LeAnne Burnett leanne.burnett@crowedunlevy.com

Crowe & Dunlevy
Counsel for Oklahoma Farm Bureau, Inc.

Kendra Akin Jones, Assistant Attorney General Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General Charles.Moulton@arkansasag.gov

Also on this 4th day of February, 2008 I mailed a copy of the above and foregoing pleading to:

David Gregory Brown
Lathrop & Gage LC
314 E HIGH ST
JEFFERSON CITY, MO 65101

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

Cary Silverman
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

C Miles Tolbert
Secretary of the Environment

State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

Gary V. Weeks
Bassett Law Firm
P. O. Box 3618
Fayetteville, AR 72702

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

/s/ Richard T. Garren